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NO. 03-1183

IN THE
SUPREME COURT OF THE UNITED STATES

BENJAMIN ENDRES,
Petitioner,

v.

INDIANA STATE POLICE,
Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

On February 17, 2004, Petitioner Benjamin Endres filed a Petition for Writ of Certiorari seeking review of the Seventh Circuit's ruling that Title VII did not require a law enforcement agency or other "paramilitary" employer, under any circumstances, to reasonably accommodate an employee's task-specific request for religious accommodation. On March 19, 2004, Respondent filed its Opposition. In general, the Petition and the Opposition properly frame for this Court the important issues raised by this case. For example, by conceding that every other Court of Appeals that has addressed a similar Title VII claim has determined — regardless of the ultimate outcome of the individual case — that a case-by-case inquiry into the reasonableness of the accommodation sought *is* necessary, while the Seventh Circuit reached the opposite conclusion, Respondent effectively highlights why this Court's intervention to resolve the circuit split is necessary. Thus, while Endres disagrees with many of the legal and factual assertions in Respondent's Opposition, only two issues raised in the Opposition merit further discussion.

First, Respondent argues that this Court, to ensure its jurisdiction, must determine whether the Eleventh Amendment is jurisdictional and if so, whether Congress validly abrogated sovereign immunity through Title VII's religious accommodation requirement. (Resp. Br. at 15.) Respondent goes on to imply that Endres did not adequately present the jurisdictional issue to this Court. (*Id.*) Respondent's argument fails because the Eleventh Amendment is not jurisdictional and therefore this Court need not reach the Eleventh Amendment issue,[1] and even if the Eleventh Amendment issue were jurisdictional it would

[1] Endres discussed the Eleventh Amendment issues in his Petition. (Pet. at 20-23.)

come within a well-established exception to Rule 14.1(a)'s requirements.

Second, Respondent appears to make a preclusion argument, referring to state tribunal factual findings and asserting that "[t]hese state tribunal factual findings may estop any contrary federal court findings." (*Id.* at 16-17.) This argument fails both as a matter of law — because Respondent never raised this argument below and it is therefore waived — and logic, because the natural result of Respondent's argument would be that no court, state or federal, would provide Endres a forum to raise his Title VII claims.

I. There Is No Rule 14.1 Bar To This Court's Consideration Of The Issues Raised In The Petition.

Endres filed a complaint in the Northern District of Indiana alleging that Respondent illegally failed to accommodate his religious beliefs under Title VII. (Pet. App. D1-D5.) Respondent filed a motion to dismiss for lack of subject matter jurisdiction arguing that Congress invalidly abrogated state Eleventh Amendment immunity. (*Id.* C2-C3.) The district court denied the motion (*id.* C1), and Respondent pursued an interlocutory appeal. (*Id.* A3.) The Seventh Circuit, stating that the Eleventh Amendment does not present a jurisdictional barrier because states may consent to federal court jurisdiction, addressed whether Endres's complaint stated a claim. (*Id.* A4.)

In the first instance, if it chooses not to do so, this Court need not address the Eleventh Amendment issue because the Eleventh Amendment does not limit federal court subject matter jurisdiction. *See, e.g.*, *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 388-89 (1998) (ruling that the Eleventh Amendment "does not automatically destroy

original jurisdiction," because the Eleventh Amendment grants states a "defense" which the state may waive and which a court need not raise); *Calderon v. Ashmus*, 523 U.S. 740, 745 n.2 (1998) ("While the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power, . . . we have recognized that it is not coextensive with the limitations on judicial power in Article III."). Consequently, the Seventh Circuit acted permissibly in addressing the merits of Endres's Title VII claim without reaching the Eleventh Amendment, and this Court need not address the issue.

Alternatively, even if the Eleventh Amendment were jurisdictional and this Court were to decide to reach the issue, Respondent's argument that Endres violated Rule 14.1(a) by not including it as a question presented fails because the Court must always determine its jurisdiction. Rule 14.1(a) states that the Court will address only those questions "fairly included" in the questions presented. The Court has "made exceptions to Rule 14.1(a)" for cases with the "possible absence of jurisdiction." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33 (1993); *see also Lake County Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 398 (1979) ("An exception to [Rule 14.1(a)] is the question of jurisdiction."). Even assuming the Eleventh Amendment presents a jurisdictional issue the Court must raise, and assuming that Endres's question presented does not fairly include the Eleventh Amendment issue, this Court may still reach the issue consistent with Rule 14.1(a). Therefore, Respondent's argument is without merit.

II. The State Tribunal Proceedings Do Not Preclude Consideration Of Endres's Title VII Claims In Federal Court.

Respondent's preclusion argument fails as well, and thus presents no impediment to the granting of certiorari. Preclusion is an affirmative defense that is generally waived if not raised in a pleading. Fed. R. Civ. P. 8(c); *Arizona v. California*, 530 U.S. 392, 410 (2000). Respondent never raised below the argument that state tribunal factual findings are preclusive in any manner in this federal action, despite the fact that those claimed findings existed at the time of the briefing and argument before, and ruling of, the Seventh Circuit. As a result, Respondent has waived the argument.

In essence, Respondent argues that no court may hear Endres's Title VII claims. Here, Respondent argues that state tribunal findings are preclusive (Resp. Br. at 16.), while in state court Respondent succeeded in arguing that Endres's federal court action was preclusive to the state court action. (Resp. App. 7a-9a.) Respondent cannot have it both ways, effectively denying Endres from having his day in *any* court.

CONCLUSION

Endres presents an issue of national import: whether police departments, as well as other "paramilitary" employers including fire departments, have a duty under Title VII to accommodate task-specific requests for religious accommodation. Respondent raises no argument in its Opposition that undermines the need for this Court to

address that issue for the first time, thus resolving a current split in the circuits. Accordingly, this Court should grant Endres's Petition.

Respectfully Submitted,

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